No. 11,238

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ZEREFA MALOOF,	*Appellant,*
VS.	
UNITED STATES OF AMERICA,	*Appellee.*

APPELLANT'S SUPPLEMENTAL BRIEF.

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During oral argument Mr. Justice Bone suggested that the parties comment on the decision of this Court in *Fink v. United States,* 142 F. (2d) 443 and that appellant discuss the case of *United States v. Fried,* 149 F. (2d) 1011, referred to by attorney for appellee. The Court invited the submission of such additional authorities as may bear on the question involved. Hence, this supplemental brief.

THE CASE OF FINK v. UNITED STATES.

The opinion of this Court in the *Fink* case is brief and does not set forth the charging part of the indictment. An examination of the record of the case,

in the office of the clerk of this Court, discloses that the question involved herein was not raised, discussed or decided.

The record in the *Fink* case shows that Fink was charged by an information with violating the Emergency Price Control Act in the sale of refrigerators. Fink's assignment of errors, excluding the questions of evidence, assigned the following points (a) The information was defective as being in violation of the due process clause, (b) The information failed to state a public offense, and (c) The Act was unconstitutional. Fink's single brief—which actually contains no argument and amounts to no more than a statement of legal contentions—refers only to one point as showing the invalidity of the information, viz.: that Congress has no power to fix prices at which commodities may be sold unless such commodities are affected with a public interest and, therefore, the information was invalid as being based on a void statute. Fink advanced no argument that the information was void because the allegation as to the maximum price was but a mere conclusion of the pleader. The Government's brief is devoted entirely to a discussion of the validity of the Act and does not touch upon the point involved herein.

This Court disposed of Fink's contentions as to the invalidity of the Act by merely referring to the case of *Yakus v. United States.* Then this Court, *sua sponte,* noted the assignment that the information failed to state a public offense and decided the issue as follows:

> "One of appellant's assignments of error asserts that the information 'failed to state a public offense,' meaning, we suppose, that it failed to charge an offense against the United States. There is no merit in this assignment. Each count of the information charged an offense against the United States, namely a violation of §§ 4(a) and 205(b) of the Emergency Price Control Act of 1942, 50 U.S.C.A. Appendix §§ 904(a) and 925(b)."

The questions of whether an information is sufficient that merely states the maximum price of an article as a mere conclusion of the pleader, whether an allegation is sufficient that states a price as being fixed by law, when no law fixes such price and whether, when a maximum price is arrived at by particular facts and circumstances, such facts and circumstances must be alleged by the pleader, were never raised, argued or decided in the *Fink* case.

ADDITIONAL AUTHORITIES.

In addition to the authorities cited in appellant's opening brief, on the question of the information being insufficient as stating the maximum rental as a mere conclusion of the pleader, we submit the following pertinent authorities:

First, we call the Court's attention to the rule announced by the Supreme Court in the case of *United States v. Cruikshank,* 92 U.S. 542, and *United States v. Hess,* 124 U.S. 483, 487, wherein it is stated that in order to constitute a valid indictment "facts are to

be stated, not conclusions of law alone" and that the information, where the offense is prescribed in generic terms, "must descend to particulars."

In *United States v. Ferranti* (D.C.—N.J.), 59 Fed. Supp. 1003, the Court had before it an indictment charging the sale of poultry in violation of the Maximum Price Regulations. The indictment alleged that the poultry had been sold "at the price per pound of 34¢ * * * the maximum price permitted by said regulation * * * being 31¢ per pound." The language of the decision is peculiarly applicable to the case at bar. First, the District Judge stated the general rule as announced in *Fontana v. United States,* 262 Fed. 283, as follows:

> " 'It is essential to the sufficiency of an indictment that it set forth the facts which the pleader claims constitute the alleged transgression, so distinctly as to advise the accused of the charge which he has to meet, and to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same offense, **and so clearly that the court may be able to determine whether or not the facts there stated are sufficient to support a conviction.** (Citing cases.)' "

Then, in applying the rule to the indictment under consideration, the Court said:

> "Applying the principles stated in the cited cases, it is obvious that the indictment in the instant case does not fully inform the defendant of the nature and cause of the accusation made

against him. To be sure the indictment alleged the prices at which it is claimed the defendant sold the poultry in question and the maximum prices at which the same could have been sold lawfully, but **the allegations as to the maximum prices legally allowable are not allegations of facts but of conclusions, based upon undisclosed facts. The maximum price regulation alleged to have been violated does not establish in specific terms maximum prices for poultry; it only prescribes a formula by which such prices may be calculated, once the facts relied on for that purpose are determined. If every fact alleged in the indictment, excluding conclusions, should be admitted, it would not necessarily follow that the defendant is guilty of the crimes charged. What the maximum prices for poultry were on the dates alleged in the indictment will depend on proof of facts not disclosed by the indictment.**" (Emphasis supplied.)

The same reasoning applies to the case at bar. No provision of law fixes the rental of the room in question. No regulation of the administrator fixes such rent. It only prescribes a formula by which such price may be calculated once the facts relied on for that purpose are determined.

In *Johnson v. United States* (CCA-9), 294 Fed. 753, the indictment charged the defendant with unlawfully having in their possession certain narcotics "said defendants then and there being persons required to register and pay a tax under the provisions of the act aforesaid as amended, and said defendants not then and there having registered under the provi-

sions of said act." This Court, at page 756, stated as follows:

> "Again, the averment that the plaintiff in error was a person required to register is a naked conclusion of law at best."

A further quotation from the *Johnson* case will be found on page 9 of our opening brief.

In *United States v. Potter* (CC), 56 Fed. 97, the indictment alleged that reports were made "as required by law." The Court held this allegation to be a mere conclusion of law and a defect in matter of substance.

In *United States v. El Paso etc. Co.* (D.C. Tex.), 178 Fed. 846, the indictment purported to charge the offense of transportation of livestock from a quarantined district into the state. The Court held the indictment insufficient and stated as follows:

> "The allegation that the Secretary duly and legally established quarantine states only the conclusion of a pleader as matter of law, which is not sufficient in criminal pleading."

In *Boykin v. United States* (CCA-5), 11 Fed. (2d) 484, the defendant was charged with the crime of bribery, it being alleged that the bribe was to operate upon the prohibition agent as to matters pending or to be brought before him in relation to his official duties. The Court held the indictment insufficient as follows:

> "The representatives of the government knew the acts which they would rely on to show a cor-

> rupt intent. But it is impossible, as it appears to us, to ascertain from the indictment what acts would be relied on at the trial. Nothing but conclusions are stated. No facts are alleged from which it could be determined whether the proceedings pending or to be brought before the prohibition agent related or would relate to violations of the National Prohibition Act, * * *.' The trial court was wholly without information as to the facts relied on, and could not possibly have determined whether the matters complained of were such as could affect the official duties of the prohibition agent."

Early in our judicial history Chief Justice Marshall stated the reason why an accusatory pleading must state facts showing the commission of a crime in *The Schooner Hoppet v. United States,* 7 Cranch 389, 3 Law. Ed. 380. The Chief Justice's language in this regard is as follows:

> "That the court may see with judicial eyes that the fact, alleged to have been committed, is an offense against the laws, and may also discern the punishment annexed by law to the specific offense."

In speaking on the fact that the accusation refers to a law, the Chief Justice said:

> "It is not controverted that in all proceedings in courts of common law, either against the person or the thing for penalties or forfeitures, the allegation that the act charged was committed in violation of law, or of the provisions of a particular statute will not justify condemnation, unless, independent of this allegation, a case be

> stated which shows that the law has been violated. The reference to the statute may direct the attention of the court, and of the accused, to the particular statute by which the prosecution is to be sustained, but forms no part of the description of the offense. The importance of this principle to a fair administration of justice, to that certainty introduced and demanded by the free genius of our institutions in all prosecutions for offenses against the laws, is too apparent to require elucidation, and the principle itself is too familiar not to suggest itself to every gentleman of the profession."

In the case at bar how can the Court ascertain from the information whether a crime has or has not been committed? The allegation that two dollars was the maximum rental price fixed by law is but the conclusion of the pleader. No law or regulation fixed such price. The price was a matter of fact and had to be pleaded and proved as a fact.

THE INFORMATION FAILS TO ALLEGE THAT ACCUSED WAS A PERSON REGULATED BY THE ACT.

At oral argument a member of the Court suggested that the allegation in the information that appellant did "rent * * * a certain room" was sufficient to justify the conclusion that she was a person who had charge of such room to the extent of being able lawfully to rent it. This is supplying a necessary element of the information by inference and intendment. No

essential element of a charge can be supplied by inference or intendment.

In cases where diversity of citizenship or alienage was necessary to confer jurisdiction upon one of our Courts, the Supreme Court has repeatedly held that such allegations must be made directly and positively and the absence of such direct and positive allegations could not be supplied by inference, intendment or construction.

In *Bors v. Preston,* 111 U.S. 252, 28 L. ed. 419, the action was one brought by plaintiff as a citizen of New York against the defendant, alleged to be consul at the port of New York for the Kingdom of Norway and Sweden. The Court held such allegation insufficient as an averment of alienage.

In the case of *Stuart v. City of Easton,* 156 U.S. 46, 39 L. Ed. 341, the opinion reads:

> "The Chief Justice: Plaintiff in error is described throughout the record as 'a citizen of London, England,' and the defendants as 'corporations of the state of Pennsylvania.' As the jurisdiction of the circuit court confessedly depended on the alienage of plaintiff in error, and that fact was not made affirmatively to appear, the judgment must be reversed * * *."

In the case of *Horne v. Hammond Co.,* 155 U.S. 393, 39 L. Ed. 197, the averment held insufficient to show citizenship was that the woman was "the widow of the late Granville P. Horne, of Chelsea, Suffolk County, Commonwealth of Massachusetts, and that

she was duly appointed by the Probate Court of Suffolk County administratrix of his estate."

See also the cases of:

Anderson v. Watt, 138 U.S. 694, 34 L. Ed. 1078;

Brown v. Keene, 8 Pet. 112, 8 L. Ed. 885;

Mansfield v. Swan, 111 U.S. 379, 28 L. Ed. 462;

as other illustrations of insufficient allegations of this character. Of course the last six cited cases were civil actions and the Court was justified in examining the record in order to determine if the lower Court acquired jurisdiction. In the case at bar the record cannot be examined for such purpose, but only the information.

THE CASE OF UNITED STATES v. FRIED, RELIED ON BY THE GOVERNMENT.

Mr. Henderson, arguing for the Government, mentioned the case of *United States v. Fried,* 149 F. (2d) 1011, as disapproving the case of *United States v. Johnson,* 53 F. Supp. 167, relied on by appellant.

The *Fried* case was decided in the Second Circuit and under rules of law and procedure peculiar to that circuit.

The information in the *Fried* case charged a violation of the Act and is summarized by the Court as follows:

"Each count alleged the date of the sale, the buyer, the kind of liquor (including the brand),

> the amount and the price; and concluded as follows: 'which sum constituted a price per case permitted to be charged by said defendant for such merchandise under Maximum Price Regulations Nos. 193 and 445 as promulgated by the Price Administrator'."

No challenge to the form or sufficiency of the information was made until the case was on appeal.

The Court admitted that the information set forth only legal conclusions and then, pursuant to its own decisions and contrary to the law of other circuits and as announced by the Supreme Court, held that such was a defect in matter of form and not of substance. The Court's language is as follows:

> "Strictly, we need say no more as to the information than that the objection was raised too late; for no essential allegation was omitted, and the defect, if any, was only of insufficiency in form: i.e., **that instead of facts the information alleged only legal conclusions.**" (Emphasis supplied.)

The allegation of a material fact in a pleading merely as a legal conclusion is defect in a matter of substance. (See cases cited in Appellant's Opening Brief and under the heading herein of "Additional Authorities".)

Then the Court proceeded to discuss the matter and, under rules pertaining to the Second Circuit, held the allegations sufficient:

> "We regard the defect as falling within § 556 of Title 18 U.S.C.A., and of no importance unless the accused can show that the information as a whole does not advise him adequately of what he

> has to meet. Not only in civil, but in criminal, proceedings we demand nothing more than that a party charged shall be told the facts fully enough, and in sufficient season, to enable him to prepare his defense. Inconsistencies between allegation and proof, and inadequacies in allegation, are unimportant unless they result in such prejudice. Our latest decisions upon the point are (here the court cites three decisions from its own, the second, circuit). In so far as the decisions in United States v. Johnson, D.C., 53 F.Supp. 167 and United States v. Ferranti, D.C. N.J., 59 F. Supp. 1003, are to the contrary, they do not represent the law of this circuit."

The Court was in error in holding that the defect was one of form only and therefore cured by Sec. 556 aforesaid. The failure to allege a material and essential fact, or alleging such merely as a conclusion, is a defect in matter of substance.

> "Section 1025, Revised Statutes (18 USCA § 556), has reference to form only, and cannot be invoked to cure the omission of an essential element of the offense sought to be charged."
>
> *Wishart v. United States* (CCA-8), 29 Fed. (2d) 103, 107;
>
> *Asgill v. United States,* 60 Fed. (2d) 780.

The Court entirely overlooked the fact that the jurisdiction of the Court depended upon the filing of a valid accusatory pleading—one that stated the facts constituting the offense.

A Criminal Court can only acquire jurisdiction by the filing of a sufficient charge of crime in such Court:

Ex parte Bain, 121 U.S. 1, 30 L. ed. 849;
United States v. London, 176 Fed. 976, 979;
Post v. United States, 161 U.S. 583, 40 L. ed. 505.

"A person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court."

Albrecht v. United States, 272 U.S. 1, 71 L. ed. 505.

It is interesting to note that the Court, in discussing the evidence, held that the testimony of witnesses as to their conclusion of what the regulations provided was insufficient to support a conviction. It is impossible to reconcile these two propositions. **If the evidence consisting of a conclusion was insufficient to establish the material fact, then the allegation of a conclusion in the pleading was insufficient as an allegation of such fact.**

Thus, it will be seen, the *Fried* case merely announces rules applicable only to the second circuit, rules which are at variance with those of all other circuits and contrary to the law as announced by the Supreme Court.

Dated, San Francisco, California,
December 16, 1946.

Respectfully submitted,
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